



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 30, 1993

Ms. Donna M. Atwood  
Legal Counsel  
Dallas/Fort Worth International Airport  
Administrative Offices - East Airfield Drive  
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OR93-093

Dear Ms. Atwood:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).<sup>1</sup> Your request was assigned ID# 17829.

The Dallas/Fort Worth International Airport (the "airport") has received a request for certain information relating to a professional services contract awarded for environmental management services (contract no. 8001283). Specifically, the requestor, who competed for the contract, seeks "our competitors' Statements of Qualifications" submitted for the contract. You claim that some of the requested information is excepted from required public disclosure by former sections 3(a)(1) and 3(a)(10) of the Open Records Act (now found at sections 552.101 and 552.110, respectively, of the Government Code).

Pursuant to section 552.305 of the Government Code, we have notified the 21 companies whose interests may be affected by disclosure of the requested information. In response, we have received letters from twelve companies: Alan Plummer and Associates, Inc.; Albert H. Halff Associates, Inc.; Camp Dresser & McKee, Inc.; Freese and Nichols, Inc.; Fugro-McClelland (Southwest), Inc.; Geo-Marine, Inc.; Greiner, Inc.; Industrial Compliance; Maxim Engineers, Inc.; Metcalf & Eddy; Scientech, Inc.; and Veritech Environmental Services. Seven of the respondents--Alan Plummer and Associates, Inc., Albert H. Halff Associates, Inc., Freese and Nichols, Inc., Greiner, Inc.,

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<sup>1</sup>The Seventy-Third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46, at 988. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

Industrial Compliance, Maxim Engineers, Inc., and Sciencetech, Inc.--do not object to release of their statement of qualifications. Accordingly, their statements of qualifications must be released. *See, e.g.*, Open Records Decision Nos. 405 (1983); 402 (1983). The remaining five respondents, however, claim that their statements of qualifications are excepted from required public disclosure by former sections 3(a)(1), 3(a)(4) (now found at section 552.104 of the Government Code), and 3(a)(10) of the Open Records Act. The remaining nine companies have not responded to our invitation to submit arguments explaining why their statements of qualifications are excepted from disclosure under the Open Records Act. Accordingly, the information concerning these companies may not be withheld from required public disclosure and must also be released. *Id.*

We turn first to section 552.104 of the Government Code. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect governmental interests in commercial transactions; ordinarily, it does not apply once, as here, the contract has been awarded. Open Records Decision No. 541 (1990). Neither the airport nor the respondents indicate why the requested information may be withheld under section 552.104 at this time. Accordingly, the requested information may not be withheld under section 552.104.

We turn next to section 552.110. Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Commercial or financial information is excepted under section 552.110 only if it is privileged or confidential under the common or statutory law. Open Records Decision No. 592 (1991) at 9.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business . . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or

*a list of specialized customers*, or a method of bookkeeping or other office management. [Emphasis added.]

RESTATEMENT OF TORTS § 757, cmt. b (1939).

This office has previously held that if a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we must accept a private party's claim for exception as valid under that branch if that party establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.<sup>2</sup> When neither the agency nor the company provides relevant information regarding factors necessary to make a 552.110 claim, there is no basis to withhold the information under section 552.110. See Open Records Decision No. 402 (1983).<sup>3</sup>

We have considered the respondents' arguments. We conclude that Camp Dresser & McKee, Inc., Fugro-McClelland (Southwest), Inc., Geo-Marine, Inc., Metcalf & Eddy, and Veritech have not provided us with information sufficient to establish a *prima facie* case that information contained in their statements of qualifications constitutes "trade secrets." Furthermore, we are aware of no statute or judicial decision that makes any information contained in their statements privileged or confidential. Accordingly, we conclude that their statements of qualifications may not be withheld under section 552.110 of the Government Code and must be released in their entirety.

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<sup>2</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

*Id.*; see also Open Records Decision Nos. 319, 306 (1982); 255 (1980).

<sup>3</sup>Some of the respondents claim that the requested information is excepted from required public disclosure under the "commercial or financial information" branch of section 552.110. On the basis of the reasoning in Open Records Decision No. 494 (1988), these companies assert that the requested information is excepted because its release would either 1) impair the governmental body's ability to obtain the information in the future or 2) cause substantial harm to the competitive position of the person from whom the information was obtained. Past open records decisions issued by this office have relied on federal cases ruling on exemption 4 of the federal Freedom of Information Act (FOIA) in applying section 552.110 to commercial information. See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). However, in Open Records Decision No. 592 (1991), reliance on federal interpretations of exemption 4 of FOIA was reexamined. As a consequence of this reexamination, open records decisions exempting commercial and financial information pursuant to federal interpretations of exemption 4 were overruled. Unless the information requested constitutes trade secrets or is "privileged or confidential" under the common or statutory law of Texas, it cannot be withheld under section 552.110.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Rebecca L. Payne  
Section Chief  
Open Government Section

RLP/GCK/rho

Ref.: ID#s 17829; 17986  
ID#s 18009; 18098  
ID#s 18103; 18105  
ID#s 18114; 18119  
ID#s 18235; 18355  
ID#s 18366; 18378  
ID# 18400

Enclosures: Submitted documents

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